Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Expedited Forbearance Under	)	
47 U.S.C. § 160(c) and Section 1.53	)	
From Application of Rule 51.319(d)	)	WC Docket No. 05-261
To Competitive Local Exchange Carriers Using	)	
Unbundled Local Switching to Provide	)	
Single Line Residential Service to End Users	)	
Eligible for State or Federal Lifeline Service	)	

OPPOSITION OF SBC COMMUNICATIONS INC

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Introduction and Summary

In the *Triennial Review Remand Order* ("TRRO"),[2] the Commission modified Rule 51.319(d) so as to remove from the prior version of that rule the requirement that ILECs provide access to unbundled mass-market switching. In addition to simply excising that requirement from the rule, the Commission also incorporated into the new rule an affirmative statement that ILECs are not required to unbundle mass-market switching. Now, less than eight months after the Commission's decision, Fones4All requests that the Commission reinstitute its unbundled mass-market switching requirement in certain instances. Cloaking its arguments in the mantle of universal

[1] SBC Communications Inc. submits this opposition on behalf of itself and its operating company affiliates (collectively, "SBC"). Those affiliates are Southwestern Bell Telephone, L.P.; Nevada Bell Telephone Company; Pacific Bell Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Inc.; Michigan Bell Telephone Company; The Ohio Bell Telephone Company; Wisconsin Bell, Inc.; and The Southern New England Telephone Company.

[2] *Unbundled Access to Network Elements; Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, *Order on Remand*, 20 FCC Rcd 2533 (2004) (*TRRO*), *appeal docketed*, No. 05-1095 and consolidated cases (D.C. Cir. March 23, 2005).

service, Fones4All rehashes arguments it and another CLEC unsuccessfully made in the *TRRO* proceeding. There, Fones4All requested that the Commission require ILECs to unbundle mass-market switching to allow CLECs to serve single line residential customers eligible for lifeline service. Now, Fones4All seeks to impose the same requirement by asking the Commission to "forbear" from applying Commission Rule 51.319(d). Fones4all thus asks the Commission to re-impose on ILECs the obligation to unbundle local switching by "forbearing" from a Commission rule that eliminates that obligation. On its face, the petition is absurd.

Fones4All's petition is an improper use of the forbearance tool. Using forbearance to create new rules as Fones4All requests would make a mockery of the fundamental purpose underlying the statutory forbearance tool. Rather than seeking to eliminate unnecessary or outdated regulatory burdens on carriers, as Congress intended, Fones4All seeks to use forbearance to *impose* unbundling obligations on ILECs that the Commission found were unnecessary and inconsistent with the statutory unbundling criteria in a decision released less than eight months ago. Fones4All's petition thus is flatly inconsistent with the deregulatory goals of the Act in general and section 10 in particular.

Further, the petition is defective insofar as it ignores the Supreme Court's holding that unbundling obligations require an affirmative finding of impairment. Consequently, even if the Commission did "forbear" from its statement in Rule 51.319(d) that ILECs are not required to unbundle mass-market switching, as the petition asks, such forbearance would not give rise to the affirmative unbundling requirement that Fones4All seeks. That would require a rulemaking. The Commission, however, can not use its forbearance

authority to create a brand new set of rules and obligations. Forbearance is an eraser not a pencil. The petition is thus not only absurd, it is pointless.

Even apart from all of these flaws, Fones4All fails to show that the forbearance it seeks comes close to satisfying the statutory forbearance criteria. Accordingly, the Commission must deny its petition.

I. FONES4ALL'S PETITION SHOULD BE DISMISSED OUT OF HAND BECAUSE IT IS INCONSISTENT WITH THE DEREGULATORY PURPOSES OF SECTION 10, IS PROCEDURALLY DEFECTIVE, AND, IN ANY EVENT, WOULD NOT PROVIDE THE RELIEF SOUGHT.

As the Commission previously has recognized, through the 1996 Act, Congress sought to establish a pro-competitive, deregulatory national policy framework designed to shift telecommunications markets from regulation to competition as quickly as possible.[3] Integral to achieving this goal, section 10 of the Act authorizes the Commission to forbear from applying any regulation or requirement of the Act. The fundamental precept underlying section 10 is thus the reduction or elimination of regulatory burdens on carriers, where the Commission determines that such regulatory requirements are unnecessary or that relaxed regulation is in the public interest.[4]

Fones4All's petition would turn section 10 on its head. Rather than reducing regulatory burdens on carriers, Fones4All's forbearance request would impose additional regulatory burdens on ILECs that the Commission—in a decision released less than eight

[3] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Notice of Proposed Rulemaking*, 11 FCC Rcd 7141 at ¶ 1 (1996); *see also* Communications Act of 1995, H.R. Rep. No. 204, 104th Cong. 1st Session, at 89 (1995) (*House Report*).

[4] *House Report* at 89; Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 23, 104th Cong. 1st Session at 5 (1985) (*Senate Report*); *see also Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, *Memorandum Opinion and Order*, 20 FCC Rcd 9361, ¶ 12 (2005) (*IP Forbearance Order*) "Section 10, as we have stated, constitutes 'an important tool to realize this [deregulatory] goal.'"

months ago—rightly eliminated as inconsistent with the unbundling requirements of the Act and the public interest. Granting Fones4All's petition would be inconsistent with the deregulatory purpose of the forbearance tool, and thus an improper exercise of the Commission's forbearance authority.

Moreover, even accepting *arguendo* that the Commission may use forbearance to increase rather than decrease regulatory burdens, section 10 clearly does not supplant the rulemaking provisions of the Administrative Procedure Act with respect to the establishment of new regulatory requirements. Yet that is precisely what Fones4All seeks. Rather than asking the Commission simply to forbear from applying a regulatory provision, it seeks a brand new set of rules. Fones4All demands that the Commission "mak[e] UNE-P available to competitors to serve low income single line customers."[5] There are, however, no rules currently requiring the provision of unbundled mass-market switching, or UNE-P, for any class of customer. The only way for the Commission to meet Fone4All's demand would be to create new rules re-instituting mass-market unbundling for CLECs serving that class of customers. Fones4All's demand plainly surpasses the bounds of the Commission's authority under section 10.

Granting Fones4All's petition will not provide it the relief it seeks. Fones4all's petition is premised on the notion that ILECs are subject to an overarching obligation to unbundle every component of their networks, subject only to contrary restrictions granted by the Commission. Thus, Fones4All couches its requested relief as forbearance "from

[5] Fones4All Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service ("Petition"), filed July 1, 2005, at 9.

applying the rules *restricting the availability* of ULS."[6] Fones4All, however, suffers from a fundamental misconception of how the Act's unbundling provisions, in conjunction with the Commission's unbundling rules, operate.

The Act does not create plenary availability of every conceivable UNE. Rather, as the Supreme Court long ago made clear, under the Act, an ILEC has *no* obligation to unbundle *any* component of its network until the Commission makes a proper impairment finding and adopts a rule requiring the ILEC to unbundle that component.[7] In this instance, the Commission removed its prior rule requiring the provision of unbundled mass-market switching. The Commission also happened to include in its new rule a statement affirming that ILECs have no obligation to unbundle mass-market switching. But eliminating that affirmative statement confirming the absence of an obligation would only leave a vacuum – it certainly would not require ILECs to unbundle mass-market switching. As discussed above, to do so would require a rulemaking to adopt new rules—based on a finding of impairment as required by the Act—imposing the unbundling requirements Fones4All seeks, which is not something the Commission has the power to do in this proceeding. The Commission therefore should dismiss Fones4All's petition out of hand.

II. FONES4ALL'S PETITION DOES NOT MEET THE STATUTORY FORBEARANCE CRITERIA.

Even if the Commission were to consider Fones4All's petition on the merits, the Commission must reject the petition for failure to satisfy the statutory forbearance

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[6] *Id.* at 13 (emphasis added).

[7] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999) ("Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available, it requires the Commission to determine on a rational basis *which* network elements must be made available . . . ").

criteria. Section 10 of the Act authorizes the Commission to forbear from any regulation or provision of the Act if it determines:

> (1) enforcement of such regulation . . . is not necessary to ensure that the charges . . . by . . . that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation . . . is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such . . . regulation is not consistent with the public interest.

47 U.S.C. § 160(a). Congress further directed the Commission, in evaluating whether forbearance is in the public interest, to consider whether "forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). Thus, before the Commission may forbear from enforcing or applying any regulation, it first must find that all three prongs of section 10 are satisfied.[8] And it may not find that forbearance is in the public interest if elimination of a regulation will undermine competition.

Fones4All's petition is no more than a rehash of arguments it raised in the *TRRO* proceeding. For the same reasons that Fones4All failed to show that mandatory unbundling of mass-market switching is appropriate or consistent with section 251 of the Act, it also has failed to show that imposition of those very same requirements through forbearance is consistent with the public interest, or that eliminating those rules would better promote facilities-based competition (and thus better protect consumers) than continuing to enforce those rules. The Commission already considered and rejected Fones4All's arguments in declining to require any unbundling of mass-market switching,

[8] *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.2d 502, 509 (D.C. Cir. 2003).

and it should do so again here by rejecting Fones4All's request for forbearance from applying those rules.

After nearly a decade of ubiquitous narrowband unbundling, the *TRRO* properly found that CLECs are not impaired without switching, it further found that switch unbundling discourages facilities-based competition, and it accordingly declined to make switching (and, hence, UNE-P) available for CLECs seeking to serve any customer in any market.[9] The record evidence in the *TRRO* was unequivocal: switches are significantly deployed on a competitive basis. There are approximately 10,000 competitive switches, 8,700 of which are more efficient packet switches.[10] These switches are deployed in both major markets and small communities — places such as Seguin, Texas; Mojave, California; Mishawaka, Indiana; and Lenexa, Kansas — and they serve customers in wire centers containing 86% of all BOC-switched lines.[11] Efficient CLECs, moreover, use these switches to serve a wider area than ILECs have previously done.[12] Thus, even if there currently are no CLEC switches in a particular wire center, that does not suggest impairment because CLECs "can and do serve such areas using switches located in other areas."[13] In short, the Commission reasonably determined that competitors can use competitive switches not just in the largest markets, but throughout the country.

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[9] *See TRRO* ¶¶ 199-225.

[10] *See id.* ¶ 206 & n.545.

[11] *See id.* ¶ 206 n.542

[12] *See id.* ¶¶ 206-207.

[13] *Id.* ¶ 207.

In addition, the Commission found that the record amply demonstrated that UNE-P hinders facilities-based competition.[14] As the Commission observed, "[t]he record demonstrates the validity of concerns that unbundled mass-market switching discourages competitive LEC investment in, and reliance on, competitive switches."[15] In particular, the availability of unbundled switching both "discourage[s] [CLECs] from innovating and investing in new facilities" and "creates disincentives for competitive LECs to use those competitive switches that have been deployed."[16] The Commission thus concluded, "even if some limited impairment might exist in some markets, we would decline to require unbundling of mass-market local circuit switching pursuant to our 'at a minimum' authority, based on the investment disincentives that unbundled local circuit switching, and particularly UNE-P, creates."[17]

Fones4All disputes none of the Commission's conclusions. Instead, it merely says that the Commission "ignored substantial evidence in the record," namely, comments of two companies—Fones4all and Telscape—"that UNE-P availability is required to allow CLECs to serve single line residential customers who qualify for universal service subsidies."[18] It further argues that UNE-P is necessary in order to provide service to single line residential customers who are eligible for lifeline programs. Fones4All is simply incorrect, both as a matter of policy and as a matter of fact.

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[14] *See id.* ¶ 218.

[15] *Id.* ¶ 220.

[16] *Id.*

[17] *Id.* ¶ 218 (emphasis added).

[18] *Petition* at 2.

As an initial matter, Fones4All is wrong that the Commission failed to consider this issue in the *TRRO*. The Commission specifically considered and rejected calls to unbundle mass-market switching "in specific circumstances due to unique characteristics of the particular customer markets or geographic markets they seek to serve or because of the competitive carrier's size."[19] The Commission specifically rejected the policy rationale implicit in such claims, including those underlying Fones4All's petition, that CLECs necessarily are entitled to a profit when serving any purported market segment. Indeed, in delineating its "reasonably efficient competitor" standard, the Commission made clear that it considers "*all* the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could be expected to sell."[20] And reasonably efficient CLECs enter markets with the goal of "'providing the full range of services . . . to *all customers* supported by the marketplace.'"[21] With respect to residential customers in particular, the Commission rejected claims of impairment by CLECs who serve residential customers because they had not "presented evidence demonstrating that it is uneconomic to use a competitive switch to serve both business customers and residential customers."[22]

The Commission thus rejected the notion that carriers are somehow entitled to a profit on each and every type of customer they serve. If that were so, the Commission would be besieged by CLEC claims—presumably now in the form of forbearance petitions, accompanied by a host of purported public policy benefits associated with

[19] *TRRO* ¶ 222.

[20] *Id.* ¶ 24.

[21] *Id.* ¶ 25 (quoting *Triennial Review Order* ¶ 115 n.396) (emphasis added).

[22] *Id.* ¶ 222 n. 612.

serving specific market segments—that, even if they are not entitled to unbundled switching to serve the "mass market," they are entitled to UNE-P to serve individual slices of that market. Thus, for example, CLECs could argue that they need UNE-P for (i) single-person households, which tend to generate low volumes of calls; (ii) residential customers who do not order vertical features; (iii) second lines typically used for dial-up Internet access; and so on. The Commission's unbundling analysis need not and cannot be transformed into such a customer-by-customer analysis as Fones4All would have it become through its forbearance petition. Fones4All's plea that the Commission should resurrect UNE-P to benefit the "small provider focused on the Lifeline market"[23] must be summarily rejected.

In addition to finding no impairment with respect to mass-market unbundled switching, the Commission also relied upon its "at a minimum" authority, in conjunction with "evidence of disincentives for competitive LECs to rely on competitive switches," as further grounds for declining to unbundle mass-market switching in specific market segments, including residential customers. As the Commission found, "even if some limited impairment might exist" for CLECs that seek to serve residential customers, it remains the case that making UNE-P available to those CLECs would "discourage[] [CLECs] from innovating and investing in new facilities," and "create[] disincentives for competitive LECs to use those competitive switches that have been deployed."[24] Those determinations are more than sufficient to mandate denial of Fones4All's forbearance request, particularly given Fones4All's complete failure to challenge or even address them in its discussion of the statutory forbearance criteria.

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[23] *Petition* at 9.

[24] *TRRO* ¶¶ 218, 220.

Fones4All also is incorrect as a matter of fact that UNE-P is necessary to advance universal service. First, although Fones4All devotes considerable time to discussing falling telephone subscribership rates in the United States, it presents no evidence that declines in telephone subscribership are connected with a general decline in the ability to obtain basic telephone service. There is no evidence that the decline in subscribership rates indicated by the Commission's statistics are the result of consumers' inability to obtain such service rather than conscious decisions to substitute other services, including intermodal services such as VoIP and wireless.[25] More fundamentally, Fones4All fails to provide any evidence that the decline in subscribership is wholly or even substantially accounted for by lifeline-eligible consumers. Although Fones4All repeats several times the Commission's statistic that only one-third of eligible households subscribe to lifeline programs, there is no evidence of any correlation between that statistic and declining subscribership rates. More broadly, there is no support for Fones4All's assertion that a "lack of competition"[26] is responsible for nearly two-thirds of eligible subscribers not being enrolled in lifeline programs. The fact is that there is no hard evidence pointing to any single cause for the failure of eligible customers to enroll in lifeline programs. In short, there is no predicate for the most basic factual premises underlying Fones4All's petition.

Similarly, there is no support for the connection Fones4All would have the Commission draw between UNE-P and the Commission's subscribership statistics. Specifically, there is no evidence whatsoever that the availability of UNE-P will in any

[25] In fact, FCC reports show continuous tremendous growth in wireless subscribership since 1984. *See* Table 5.6, *Measures of Mobile Wireless Telephone Subscribership*, in Statistics *of Communications Carrier* (rel. Oct. 12, 2004).

[26] *Petition* at 14.

way increase subscribership or increase the provision of service to lifeline-eligible customers. To the contrary, the very statistics relied upon by Fones4All suggest a negative connection between the availability of UNE-P and subscribership. The time during which Fones4All claims subscribership decreased corresponds to the heyday of UNE-P. If Fones4All were correct that the availability of UNE-P allows "a great number of CLECs to maintain and expand their current telecommunications service to underserved universal service eligible end users,"[27] (and assuming Fones4All is correct that a decline in overall subscribership corresponds to underservice of universal service eligible customers) then it certainly is mystifying that subscribership would decline just as the availability of UNE-P reached its zenith. The plain fact is that there is no relationship between the availability of UNE-P and the provision of service to lifeline-eligible customers.

More broadly, there is no principled reason that CLECs require UNE-P in order to provide lifeline services. First, although Fones4All asserts that a facilities-based CLEC "could never recoup its costs" of serving lifeline-eligible customers, it provides no evidence to support that assertion.[28] Without any information concerning CLEC cost structures, the mere fact that universal service reimbursement in a single state is calculated based on ILEC retail rates certainly does not prove it. And, even if it did, the proper solution would be to directly address the problem of the "below cost retail rates,"[29] that even Fones4All agrees lie at the root of the problem, not to re-impose UNE-P. In any event, as discussed above, the Commission already has rejected any notion that

[27] *Id.* at 15.

[28] *Id.* at 8.

[29] *Id.* at 8.

mass-market switching should be unbundled solely to facilitate competitors who focus on a particular class of customers.

In addition, although the Act does not provide for universal service reimbursement for resale competitors, that does not necessarily mean that resellers can not compete for universal service customers. Reimbursement from universal service funds is not the only variable in calculating the profitability of serving such customers. Nor does the allegation that resale is "priced at a wholesale rate that is significantly more expensive than the UNE-P rates applicable to other carriers' UNE-P embedded costs,"[30] even if true (and there is no evidence in the record to support it), justify re-imposition of a UNE-P requirement that the Commission has found harmful to competition and the economy as a whole. At bottom, if there is some need to encourage CLECs to provide lifeline services, there is no principled reason the Commission must resurrect UNE-P to provide that encouragement.

CONCLUSION

For the foregoing reasons, Fones4All's petition for forbearance should promptly be denied.

Respectfully submitted,

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[30] *Id.* at 4.

CERTIFICATE OF SERVICE

I, Otis Robinson, state that copies of SBC's Opposition of Fone4All's Petition for Forbearance were delivered via e-mail and hand delivery on this day, Friday, October 14, 2005, to the following:

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